SYARIKAT KESEMUA SDN BHD

v.

BARAWAN RAZAK & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[SUIT NO: S-22-02-2002]
2 NOVEMBER 2004

COMPANY LAW: *Suit by company - Security for costs - Test to be applied - Factors to be considered - Delay - Effect of order on plaintiff - Whether unjust - Companies Act 1965, s. 351*

CIVIL PROCEDURE: *Costs - Security for costs - Suit by plaintiff company - Whether plaintiff unable to pay costs if unsuccessful - Test to be applied - Companies Act 1965, s. 351*

The plaintiff had, in the first suit, commenced proceedings against the applicants who, being successful applicants for alienation of certain land, had allegedly sold their land to the plaintiff. In the second suit (which had been consolidated with the first suit), the plaintiff commenced an action against one Shim Vui Geh ('the purchaser'), who also claimed to have purchased the land successfully applied for by the applicants. The plaintiff's subsequent application against the purchaser for various injunctive reliefs was dismissed; the plaintiff appealed. The plaintiff also filed an application for an Erinford injunction that the court allowed; the purchaser appealed against the order. Both appeals were pending before the Court of Appeal. This was an application under s. 351 of the Companies Act 1965 ('the Act') by the applicants and purchaser, after the Erinford injunction had been granted, for security for costs. Their main contention was that the plaintiff would be unable to pay the costs if the applicants and the purchaser were successful in their defences.

Held (dismissing the application):

[1] The court did not share the view expressed by the applicants and the purchaser that, in an application under s. 351 of the Act, the court was restricted to determining whether there was credible evidence to support the belief that the plaintiff would be unable to pay the costs in the event it did not succeed in its claim against the applicants and the purchaser.

Having considered the provision of s. 351(1) of the Act and the relevant authorities, such a question was a matter of discretion to be exercised by the court considering all the circumstances of the case. (pp 566 b-g & 567 a-d)

[2] In the present case, this application was only made after the plaintiff had made two other interlocutory applications. It was only now that the applicants and the purchaser realised that the plaintiff was impecunious when a simple search, made anytime after the second suit had been filed, would have revealed this fact. While delay *per se* does not invariably deprive a litigant of security for costs, the failure, in this instance, to make the application promptly coupled with an allegation of having spent RM240,000 in costs – a claim which, on the evidence, did not bear scrutiny – led inescapably to an inference of oppression and an oblique attempt to stifle the plaintiff's claim. (p 567 e-g)

[2a] It could not, at this stage, be said that the plaintiff's action was doomed to failure, and it was also noteworthy that the purchaser was not himself above board as the disputed land was tainted by a previous sale by the applicants to the plaintiff. An order for security for costs would invariably prevent the plaintiff from pursuing reliefs against the purchaser and applicants, a prospect that was clearly unjust. The court's discretion must always be exercised with justice in mind; therefore, security for costs was not ordered. (pp 567 h & 568 a-b)

Case(s) referred to:

Government of Sarawak v. Sami Mousawi-Utama Sdn Bhd [1998] 4 CLJ 175 HC ***(refd)***

Gula Perak Bhd v. Agri-Projects (M) Sdn Bhd [1989] 1 MLJ 422 ***(refd)***

Parksinson & Co v. Triplan Ltd [1973] 1 QB 609 ***(foll)***

Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA ***(refd)***

Tan Sri Abdul Aziz Zain & Ors v. United Overseas Land Ltd & Ors [1998] 4 CLJ 321 HC ***(foll)***

Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd [1980] 1 MLJ 95 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 351

For the plaintiff - Edwin Tsen; M/s Tan Pang Tsen & Co
For the defendants - Zulaiha Abdullah; M/s Zahirshah & Zulaiha Chiew

Reported by Suresh Nathan

JUDGMENT

Linton Albert JC:

The plaintiff had in Suit No. S22-02 of 2002 (the first suit) commenced proceedings against the defendants (the applicants) who, being successful applicants for alienation of land had allegedly sold their land to the plaintiff. In Suit No. S22-93 of 2002 (the second suit) which had been consolidated with the first suit, the plaintiff commenced action against the defendant, one Shim Vui Geh (the purchaser) who also claimed to have purchased the land successfully applied for by the applicants. Subsequently, the plaintiff took out an application against the purchaser for various injunctive reliefs but the application was dismissed by this court. The plaintiff appealed against the court's refusal to grant the injunctive reliefs and filed an application for Erinford injunction which this court allowed but the purchaser was dissatisfied with the order and has since appealed. Both appeals are now pending before the Court of Appeal. I have also dismissed the application by the applicants and the purchaser for security for costs (the application) filed after I have granted the Erinford injunction. I now give the reasons for dismissing the application.

The application was made under s. 351 of the Companies Act 1965 (the Act). It is probably useful to set out s. 351 of the Act at the outset. It is as follows:

> (1) Where a company is plaintiff in any action or other legal proceeding the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
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> (2) The costs of any proceeding before a court under this Act shall be borne by such party to the proceeding as the Court may, in its discretion, direct.

The main thrust of the argument in support of the application is the plaintiff's inability to pay costs if the applicants and the purchaser are successful in their defence and they are seeking an order that the sum of RM280,000 be paid by the plaintiff as security for costs. The sum represents RM40,000 allegedly incurred by the applicants in the first suit, RM200,000 allegedly incurred by the purchaser in the second suit and a further RM40,000 yet to be paid. Learned counsel for the applicants and the purchaser, Zulaiha Abdullah, relies on *Government Of Sarawak v. Sami Mousawi – Utama Sdn Bhd* [1998] 4 CLJ 175 where it was held that:

> The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount ...

It is painfully apparent from the affidavits filed that the plaintiff will not be able to pay RM280,000 if an order is made for the plaintiff to do so. After all, there is ample evidence to show the plaintiff has been dormant since 1995, with a miserly paid up capital of RM21 and liabilities of RM61,569. Even if calls are made on the authorised capital of RM100,000, the amount will still fall far short of the amount sought. I do not, however, share the view expressed by learned counsel for the applicants and the purchaser that in an application under s. 351 of the Act, the court is restricted to determining whether there is credible evidence to support the belief that the plaintiff will be unable to pay the costs it may be ordered to pay in the event it does not succeed in its claim against the applicants and the purchaser. If that is the case, then that will be the end of the matter and security for costs will be ordered, but that is not so. The correct approach is that which is laid down in *Parksinson & Co v. Triplan Ltd* [1973] 1 QB, 609 which is this:

> I do not think those observations are correct. I prefer to follow the cases which are to be found in the notes in 76 LJ 204 (*Ebury Garages Ltd v. Agard*) and 77 LJ 123 *(Gill All Weather Bodies Ltd. v. All Weather Motor Bodies Ltd).* Scrutton LJ said that there were too many applications against companies for security for costs. In his view "the powers of the section should be carefully used." Maugham LJ said:
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> > The section only confers discretion on the court. There may be many cases where a company is insolvent, and yet the court would not order security to be lodged.
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> I would add a case in 1962 in the Supreme Court of Eire. It is *Peppard and Co. Ltd. v. Bogoff* [1962] IR 180. Kingsmill Moore J said, at p. 188:
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> > ... the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the court which may be exercised in special circumstances.
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> Turning now to the words of the statute, the important word is "may". That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case. (per Denning, MR at p 626)

The above principles are cited with approval in *Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd* [1980] 1 MLJ 95 and *Gula Perak Bhd v. Agri-projects (M) Sdn Bhd* [1989] 1 MLJ 422, and is also reproduced in the judgment of Gopal Sri Ram, JCA in *Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals* [1998] 3 CLJ 432.

I am acutely aware that there is some controversy as to whether the court's discretion is to be exercised with a bias in favour of a defendant applicant, an approach preferred by VC George, J in *Gula Perak* or that the discretion ought not to be hampered by any special rules or regulations, the view favoured by LC Vohrah, J in *Quality Tractors.* I do not, however, find it either useful or necessary to enter the fray here except to adopt the approach taken by Abdul Hamid b. Mohamad, J (as he then was), in *Tan Sri Abdul Aziz bin Zain & 2 Ors v. United Overseas Land Ltd & 2 Ors* [1998] 4 CLJ 321 at p. 330:

> Having considered the provision of s. 351(1) of the Companies Act 1965 and the authorities, I am inclined to the view that the question is a matter of discretion for the court to be exercised considering all the circumstances of the case. It is not a question of burden of proof one way or the other.

Turning now to the facts of the present case, this application is only made after two other interlocutory applications have been made by the plaintiff. It is only now that the applicants and the purchaser realize that the plaintiff is impecunious when a simple search, if made at anytime soon after the second suit was filed, as can be expected of them, would have revealed the plaintiff's impecuniosity. While I do not think that delay *per se* invariably deprives a litigant of security for costs, here, their failure to make the application promptly, and doing so only after the determination of two interlocutory applications both of which are pending before the Court of Appeal, coupled with their allegation of having spent RM240,000 in costs, a claim which is clearly bloated with exaggeration because it does not bear scrutiny of the evidence, lead inescapably to an inference of oppression and an oblique attempt to stifle the plaintiff's claim. The deafening silence of the applicants who do not feature at all in this application is of no assistance to the alleged infirmities of the plaintiff's claim which is founded on a sale of the disputed land by the applicants to the plaintiff. It cannot at this stage be said that the plaintiff's action is doomed to failure. It is also noteworthy that the purchaser is not himself above board because even the most casual of investigation would undoubtedly have revealed that the disputed land is tainted by a previous sale by the applicants to the plaintiff. The purchaser has chosen to deal with rogue land applicants which the applicants here undoubtedly are, who deceive the

State Government by not honouring the purpose for which state land is applied for and approved, which is to use and cultivate the land themselves, but instead, go for quick and undeserved profit by selling and re-selling the land they successfully applied for to different purchasers at different times, a situation which is deprecatingly becoming increasingly frequent before this court. An order for security for costs will invariably prevent the plaintiff from pursuing reliefs not only against the purchaser but the applicants as well, a prospect that is clearly unjust. Injustice can never prevail over justice and the court's discretion must always be exercised with that in mind. I will not, therefore, order security for costs.